Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Time Warner Cable's	)	
Petition for Declaratory Ruling that	)	
Competitive Local Exchange Carriers	)	WC Docket No. 06-55
May Obtain Interconnection Under Section	)	
251 of the Communications Act of 1934,	)	
as Amended, to Provide Wholesale	)	
Telecommunications Services to VoIP	)	
Providers	)	

JOINT COMMENTS

BridgeCom International, Inc.
Broadview Networks, Inc.
CTC Communications Corp.
NuVox Communications
Xspedius Communications LLC
COMPTEL

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Dated: April 10, 2006

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SUMMARY

Nearly a decade after the inception of the Telecommunication Act, it should hardly be arguable that Sections 251(c)(2) and 251(a) of the Act require ILECs to interconnect their networks with requesting telecommunications carriers. Unfortunately, the circumstances that have engendered Time Warner's Petition for Declaratory Ruling dictate that the Commission reconfirm that entitlement. Indeed, as Time Warner's Petition evinces, some ILECs continue attempts to evade their interconnection obligations. In these cases, they argue that LECs are *not* telecommunications carriers in those cases where they serve their customers through wholesale contractual arrangements and, therefore, are *not* entitled to interconnection under Section 251of the Act. Such arguments ignore decades of law and statutory construction regarding the definition of "telecommunications carrier" and "common carrier." Such contentions are nothing more than ILEC attempts to spin straw into gold.

The Commission and the courts have repeatedly held that there is no distinction between wholesale and retail services for purposes of determining whether a carrier is providing telecommunications service and is therefore entitled to interconnection under Section 251. A carrier's provision of telecommunications services to other carriers or service providers is generally sufficient to qualify it as a telecommunications carrier.

Nor does the fact that an interconnecting CLEC serves its customers pursuant to contracts instead of tariffs vitiate the CLEC's telecommunication carrier status. To the contrary, it is common industry practice for carriers to provide telecommunication services to their retail enterprise and wholesale carrier customers by contract. The federal courts have found that a "telecommunications carrier" is a provider that offers its services to the public indiscriminately, even though that public might constitute only a very narrow segment; however, the courts have

never found that serving customers through contracts inherently or presumptively disqualifies a carrier as a telecommunications carrier. Thus, as long as a CLEC makes available or offers to make available similar services to similarly situated customers (*i.e.*, does not enter into an exclusive service arrangement or otherwise enter into an agreement that would prohibit it from serving other "like" customers), it qualifies as a telecommunications carrier.

Moreover, whether a carrier is entitled to interconnection under 251(c)(2), 251(a) or both does not turn on the identity of the interconnecting carrier's customers. It does not matter whether a CLEC's customer is an end-user, such as a residential customer or an ISP, or whether that customer is another carrier, such as another local exchange provider, an interexchange carrier, or even whether it is a VoIP provider. The Commission's ultimate regulatory classification of VoIP providers – whether it determines that VoIP is a telecommunications service or an information service – is simply not relevant to whether a carrier is entitled to interconnection with an ILEC under Section 251 to the extent its customers are VoIP service providers.

Accordingly, the Joint Commenters urge the Commission to grant Time Warner's petition by reaffirming that Sections 251(c)(2) and 251(a) of the Act, as interpreted by applicable Commission and court precedent, entitle CLECs to interconnect with ILECs to serve their customers, whether they provide wholesale or retail telecommunications.

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JOINT COMMENTS OF
BRIDGECOM INTERNATIONAL, INC., BROADVIEW NETWORKS, INC., CTC COMMUNICATIONS CORP., NUVOX COMMUNICATIONS, XSPEDIUS COMMUNICATIONS, LLC, AND COMPTEL

BridgeCom International, Inc., Broadview Networks, Inc., CTC Communications Corp., NuVox Communications, Xspedius Communications, LLC, and COMPTEL, on behalf of its member companies[1] (collectively, the "Joint Commenters"), through undersigned counsel, hereby respond to the Federal Communication Commission's ("FCC" or "Commission") March 6, 2006 *Public Notice*[2] requesting comment on Time Warner Cable's ("Time Warner") petition

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1 COMPTEL is the leading industry association representing communications service providers and their supplier partners. Based in Washington, D.C., COMPTEL advances its member's business through policy advocacy and through education, networking and trade shows. COMPTEL members are entrepreneurial companies building and deploying next-generation networks to provide competitive voice, data, and video services. COMPTEL members create economic growth and improve the quality of life of all Americans through technological innovation, new services, affordable prices and customer choice. COMPTEL members share a common objective: advancing communications through innovation and open networks.

2 *Pleading Cycle Established for Comments on Time Warner Cable's Petition for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection to Provide Wholesale Telecommunications Service to VoIP Providers*, Public Notice, WC Docket No. 06-55, DA 06-534 (rel. Mar. 6, 2006).

for declaratory ruling in the above-captioned docket.[3] The Joint Commenters fully support Time Warner's petition. As the Time Warner petition makes clear, most states have correctly concluded that competitive local exchange carriers ("CLECs") are entitled to interconnect as telecommunications carriers with incumbent local exchange carriers ("ILECs") pursuant to Section 251(c)(2) and 251(a) of the Communications Act of 1934, as amended ("the Communications Act" or "the Act"), regardless of who their customers are, wholesale or retail. However, as described in Time Warner's petition, a few states have deprived CLECs of their interconnection rights when their customers are purchasing wholesale service or are VoIP providers.[4] These rulings are legally misguided. CLECs are entitled to Section 251(a) and 251(c)(2) interconnection as long as they are providing telecommunications services consistent with earlier FCC and court decisions, and, in the case of Section 251(c)(2), meet the other relevant statutory criteria.

In order to make clear that state decisions restricting CLEC interconnection rights where the CLEC provides wholesale services or serves a VoIP provider are contrary to federal law, the Commission should issue a declaratory ruling specifically clarifying CLEC rights to interconnect to provide wholesale services to retail providers, including providers of VoIP services. Such a ruling will provide needed guidance to the states and will significantly reduce the burden of CLECs who, in the current environment, are forced to litigate this issue on a state-by-state basis. As demonstrated below, existing federal law clearly supports this conclusion.

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3 *Time Warner Cable Petition for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, filed Mar. 1, 2006 ("*Time Warner Petition*").

4 *E.g., Time Warner Petition* at 5-8 (citing state commission decisions in South Carolina and Nebraska finding that the CLEC providing service to Time Warner is not a "telecommunications carrier" and therefore not entitled to interconnection under Section 251 of the Act).

I. ARGUMENT

A. CLECs Serving Third Parties on a Wholesale Basis Qualify as "Telecommunications Carriers" Entitled to Interconnection Within the Meaning of the Act

1. All "Telecommunications Carriers" Are Entitled to Interconnection Pursuant to Section 251 Of The Act

Section 251 imposes interconnection obligations upon ILECs in two respects. Section 251(c)(2)(A) creates an obligation, unique to ILECs, versus other telecommunications carriers, to interconnect directly with requesting telecommunications carriers, including, most commonly, CLECs. This section provides, in pertinent part, that "each incumbent local exchange carrier has . . . [t]he duty to provide, for the facilities and equipment of any requesting *telecommunications carrier*, interconnection with the local exchange carrier's network for the transmission and routing of telephone exchange service and exchange access."[5]

Section 251(a)(1) of the Act incorporates a more general interconnection obligation that is imposed upon all telecommunications carriers, including CLECs. It provides that "[e]ach telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other *telecommunications carriers*."[6]

An ILEC does not get to choose whether it will connect pursuant to Section 251(c)(2) or 251(a). If a carrier requesting interconnection with an ILEC meets the criteria for Section 251(c)(2) interconnection as set forth in the Act and as interpreted by the Commission, that carrier is entitled to such interconnection and all of its benefits. If Section 251(c)(2) does not apply, a telecommunications carrier may still qualify for Section 251(a) interconnection with the ILEC.

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5 47 U.S.C. §251(c)(2)(A) (emphasis added).

6 47 U.S.C. §251(a)(1) (emphasis added).

The principle criterion in both cases, as the statutory language quoted above shows, is that the party requesting interconnection is a telecommunications carrier. Nothing in the text of the Act or in the Commission's rules limits a telecommunications carrier's interconnection rights under Section 251 to situations where it serves retail end-users. To the contrary, as demonstrated below, CLECs providing wholesale services are well-recognized as "telecommunications carriers" within the meaning of the Act, and are therefore entitled to interconnection pursuant to Sections 251(c)(2) and 251(a).

Accordingly, as a threshold matter, all "telecommunications carriers" are entitled to interconnection with ILECs under Section 251 of the Act.

2. "Telecommunications Carriers" Offer Telecommunications Services as "Common Carriers"

The Act defines a "telecommunications carrier" as:

> *any provider of telecommunications services*, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.[7]

Thus, the touchstone as to whether a provider is a telecommunications carrier is whether it is offering "telecommunications services."

The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[8] Elaborating further on the meaning of "telecommunications services," the Act explains that "telecommunications" consist

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7 47 U.S.C. §153(44) (emphasis added).

8 47 U.S.C. §153(46).

of "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[9] Thus, to be a telecommunications carrier requires the provision of (1) the transmission of information between points specified by the user (2) for a fee directly to the public or to such classes of uses as to be effectively available to the public. . ."

The definition of "telecommunications carrier," as elaborated further by the definition of telecommunications services, effectively incorporates the pre-1996 Telecommunications Act and long established definition of "common carrier" services. In *NARUC I*, the D.C. Circuit Court of Appeals held that common carrier status turns on whether: (1) the carrier holds itself out to serve indifferently all potential users; and (2) the carrier allows customers to transmit intelligence of their own design and choosing.[10] The second prong of the *NARUC I* test parallels the Act's definition of "telecommunications," and the first prong of the *NARUC I* standard essentially is a paraphrase of the statute's definition of "telecommunication service."

The Court of Appeals in *NARUC I* explained that the first prong "does not mean that a given carrier's services must be practically available to the entire public. One may be a common carrier though the nature of the service is sufficiently specialized as to be of possible use only to a fraction of the total population."[11] Consequently, if a provider indifferently offers wholesale telecommunications for a fee to all providers of other services who can use them, a provider can qualify as a telecommunications carrier regardless of the number of customers one

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9 47 U.S.C. §153(43).

10 *United States Telecom Ass'n v. FCC*, 295 F.3d 1326, 1329 (D.C. Cir. 2002), *citing National Ass'n of Regulatory Comm'rs v. FCC*, 525 F.2d 630, 640-41 (D.C. Cir. 1976) ("*NARUC I*").

11 *NARUC I*, 525 F.2d at 641.

actually has and regardless of the characteristics of the customer class.[12] Thus, in the case at hand and as explained more fully in the next sub-section, CLECs, when they indifferently offer wholesale telecommunications to their customers and prospective customers, are "telecommunications carriers."

Commission decisions confirm the foregoing discussion that the term "telecommunications carrier" as used in the 1996 Act is a restatement of the criteria previously applied to common carriers. In *Cable & Wireless*, the Commission, reviewing the legislative history of the Act, found that the definition of "telecommunication service" clarifies that telecommunications services are equivalent to common carrier services.[13] The Commission states that the definition of telecommunication service "recognizes the distinction between common carrier offerings that are provided to the public . . . and private services."[14] The courts, too, have recognized that the Act's term "telecommunications carrier" is largely synonymous with common carrier. The court in *Virgin Islands Telephone* observed more directly that "the term 'telecommunications carrier' means essentially the same [thing] as [the term] ['']common carrier.['']"[15] Accordingly, a CLEC requesting interconnection with an ILEC is a "telecommunications carrier" if it meets the test for determining whether a carrier is a common carrier and complies with Commission decisions regarding the scope of common carriage.

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12 *See Qwest Communications Corp. v. City of Berkeley*, 146 F.Supp.2d 1081, 1096 (N.D. Cal. 2001) (emphasizing the offering of services rather than the contracts that may result from such offerings).

13 *In the Matter of Cable & Wireless, PLC*, 12 FCC Rcd 8516 (1997), ¶13.

14 *Id., quoting* H.R. Conf. Rep. No. 104-458 at 116 (1996).

15 *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999), *citing Cable & Wireless* at ¶13. *See also, Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶785 (1997) ("the definition of 'telecommunications services' . . . is intended to encompass only telecommunications provided on a common carrier basis").

B. WHOLESALE PROVIDERS OF TELECOMMUNICATIONS SERVICES ARE "TELECOMMUNICATIONS CARRIERS" AND THUS HAVE THE RIGHT TO INTERCONNECT UNDER SECTION 251

The Commission has for at least 25 years recognized that a carrier that offers wholesale services in a way that meets the two-prong *NARUC I* test described in the previous section is a telecommunication carrier. In its *Universal Service Orders,* citing one of the Commission's *MTS WATS Market Structure* Orders from 1982, the Commission specifically observed that the provision of telecommunications to other carriers can qualify a provider as telecommunications carrier: "Common carrier services *include services offered to other carriers*, such as exchange access service, which is offered on a common carrier basis, but is offered primarily to other carriers."[16] Indeed, the recognition that service provided to other carriers qualifies as telecommunications service is built into the fabric of the Act. Section 251(c)(2)(A) expressly contemplates interconnection for the purposes of transmitting and routing "exchange access" traffic, which by definition includes traffic generated by the carrier customer of at least one of the interconnecting telecommunications carriers.[17]

In another of its *Universal Service Orders*, following the passage of the 1996 Act, the Commission confirmed that "a carrier may be a common carrier if it holds itself out to service indifferently all potential users *and that "[s]uch users . . . are not limited to end users.*"[18] Similarly, the Commission in its *Non-Accounting Safeguards Order* relied on the legislative history of the Act in determining that "the term 'telecommunications service' was not intended to create a retail/wholesale distinction, but rather a distinction between common and private

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16 *Id., citing MTS WATS Market Structure,* 93 FCC 2d 241, ¶¶13, 23 (1982) (access charges are regulated services and include "carrier's carrier" services) (emphasis added).

17 47 U.S.C. §251(c)(2).

18 *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶785 (1997) (emphasis added) ("*Universal Service Order*").

carriage."[19] The Commission noted in that order that "[n]either the Commission nor the courts . . . has construed 'the public' as limited to end-users of a service."[20] The D.C. Circuit Court of Appeals has specifically recognized the Commission's prior determinations regarding telecommunications carriers providing wholesale services and implicitly affirmed those findings.[21] Indeed, the federal courts, including the United States Supreme Court, have long held that a carrier's common carrier status is not vitiated simply because it provides services to another carrier, even when it is providing service as an agent: "a common carrier does not cease to be such merely because the services which it renders are performed as agent for another."[22]

In short, the operative standard is not who the carrier sells to but how it sells. If a wholesale network service provider holds itself out to sell indifferently to a class of retail communications carriers, such as cable service providers offering voice communications, including Time Warner, it clearly qualifies as a telecommunications carrier within the meaning of the Act. Such a wholesale provider is entitled to be treated as a telecommunications carrier under unambiguous established case law.

Carriers providing wholesale services to other service providers, such as Time Warner, also satisfy the second prong of *NARUC I*, which requires that the carrier allow customers to transmit intelligence of their own design and choosing. That requirement merely

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19 *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act*, as amended, 11 FCC Rcd 21905, ¶265 (1996) ("*Non-Accounting Safeguards Order*").

20 *Id.*

21 *Virgin Islands Tel. Corp.*, 198 F.3d at 930.

22 *See e.g., Fleming v. Chicago Cartage Co.*, 160 F.2d 992, 997 (7th Cir. 1947), *citing U.S. v. Brooklyn Eastern District Terminal*, 249 U.S. 296, 306-307 (1919). *See also, Southern Pacific Terminal Co. et al. v. I.C.C.* et al., 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911); *United States v. Union Stock Yard & Transit Co. et al.*, 226 U.S. 286, 33 S.Ct. 83, 57 L.Ed. 226 (1912); *Union Stockyards Co. of Omaha v. United States,* 169 F. 404 (8 Cir. 1909); *United States v. State of California*, 297 U.S. 175, 56 S.Ct. 421, 80 L.Ed. 567 (1936).

provides that a common carrier act as a conduit rather than a content provider. To the extent that the CLECs do not alter the *content* of the traffic originated by and terminated to Time Warner – even though the content is actually chosen by the other service provider's customers[23] – they also satisfy the second prong of the *NARUC I* test and are, therefore, "telecommunications carriers." The fact that some of a CLEC's customers are service providers does not alter the fact that the CLEC sends those customers' information – which, of course, may be the information of the CLECs' customers' customers – without alteration. As such, CLECs providing wholesale telecommunications services are entitled to interconnection with ILECs pursuant to Section 251 of the Act.

C. THE FACT THAT A "TELECOMMUNICATIONS CARRIER" PROVIDES SERVICE VIA CONTRACT DOES NOT RENDER IT A "PRIVATE CARRIER" AS A GENERAL MATTER

The fact that a CLEC desiring interconnection with an ILEC may serve its wholesale customers via contract does not, without more, vitiate the telecommunications carrier status of the CLEC and its rights under Sections 251(c)(2) and 251(a) to interconnect with an ILEC upon request. It has for some time been standard industry practice for CLECs and ILECs to provide service by contract to both enterprise end-user customers and wholesale service provider customers. Over fifty years ago, in *Fleming v. Chicago Cartage*, a U.S. Court of Appeals held that the mere existence of a written contract does not exclude common carrier status if the service is made available to the public.[24] Conversely, a carrier cannot escape

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[23] From the standpoint of the wholesale service provider, there is no distinction between the customer of the wholesale customer or the subscriber to the wholesale customer's services.

[24] *Fleming, supra,* 160 F.2d at 997.

common carrier status by entering into private contract.[25] Additionally, in *Qwest v. City of Berkeley*, the court cited to the Commission's holding in the *AT&T Tariff 12* case to explain that:

> a common carrier may supplement its generic offerings with offerings that are designed to meet the needs of a particular customer or a limited number of customers without violating the unreasonable discrimination prohibition if that carrier makes that more customized offering available to anyone who might find it useful and the offering is not otherwise unlawfully discriminatory.[26]

The *Qwest* court explained "the fact that the . . . contract resulted from a competitive bidding process and contemplates tailored service does not mean that Qwest *intends* to offer non-common carrier services."[27] Therefore, as long as the CLEC in question intends to offer "like" services, however specialized or narrow, to the public, they are deemed to hold themselves out indifferently and therefore satisfy the critical first prong of the common carriage test under *NARUC I.*

Turning to the specific circumstances that prompted the Time Warner petition, Sprint, for example, has stated that it intends to offer interconnection services like those provided to Time Warner "to all that are similarly situated," *i.e.,* "all entities that desire to take them and who have comparable last mile facilities."[28] There is no indication that Sprint's agreements with Time Warner preclude it from doing so. Indeed, Sprint has publicly stated that it has entered into

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25 *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994).

26 *Qwest Communications Corp.*, 146 F.Supp.2d at 1096 *quoting In re AT&T Communications Revisions to Tariff F.C.C. No 12*, 6 FCC Rcd 7037, ¶66 (1991), *citing Sea-Land Service, Inc. v. I.C.C.*, 738 F.2d 1311, 1317 (D.C. Cir. 1984).

27 *Id.*(emphasis added), *See also, Bankruptcy Estate of United Shipping Co. v. General Mills*, 34 F.3d 1383 (8th Cir. 1994) (common carriage or contract carriage, *i.e.,* private carriage, depends in part on the intent of the contracting parties).

28 *In re: Petition of Sprint Communications Co., L.P. for Compulsory Arbitration under the FTA to Establish Terms and Conditions for Interconnection with Brazos Telecommunications, Inc.*, Texas Pub. Util. Comm'n. Docket No. 31038, Response of Sprint Communications Co., Nov. 10, 2005 at 11-12.

other similar agreements with other cable companies.[29] Thus, Sprint has not only expressed its intention to hold itself out indifferently, it has actually done so, and as such is a telecommunications carrier with respect to those services despite providing service through contracts.[30]

There may be other circumstances where a carrier does not hold itself out indifferently and may be a private carrier. However, articulating them further would be beyond the scope of this proceeding because, indisputably, those circumstances are not at issue in the Time Warner Petition. The states that rejected the applications of MCI and Sprint to interconnect with various ILECs did not do so because of concerns that the particular facts of those cases demonstrated private carriage. Rather, they found as a general proposition that intermediate carriers offering services under contract to retail service providers were not entitled to be classified as telecommunications carriers within the meaning of Section 251 of the Act. In these conclusions they were simply wrong.

D. THE IDENTITY AND REGULATORY CLASSIFICATION OF AN INTERCONNECTING CLEC'S WHOLESALE CUSTOMER ARE IRRELEVANT

As demonstrated above, where a telecommunications carrier has obtained interconnection pursuant to Section 251, it does not matter whether that carrier provides wholesale services or retail services. Consequently, it does not matter whether a CLEC's customer is an end-user, such as a residential customer or an ISP, or whether that customer is another carrier, such as another local exchange provider, an interexchange carrier, or even whether it is a VoIP provider. None of these factors affect whether the CLEC is a

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29 *Id.* at 12.

30 Moreover, the remedy for a carrier seeking an interconnection agreement on the basis of a contract to provide wholesale services would not be denial of the right to interconnect. It would, at most, be a requirement that the wholesale carrier establish a contract tariff. There are, of course, numerous models in this industry at both the state and local level. *See, e.g., AT&T Tariff 12.*

telecommunications carrier. With respect to Section 251(c)(2) in particular, as long as the interconnecting carrier is routing or transmitting either "telephone exchange service" or "exchange access," the type of customer it serves and the services provided by that customer are simply irrelevant.

The obligations created by Section 251(c)(2)(A) of the Act *apply only to ILECs*, and that section provides, in pertinent part, "each incumbent local exchange carrier has . . . [t]he duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network for the transmission and routing of telephone exchange service and exchange access."[31] Thus, the touchstone of 251(c)(2), in addition to the interconnecting entity being a telecommunications carrier, is that the carrier is interconnected for the purpose of routing or transmitting telephone exchange service or exchange access service.[32]

"Telephone exchange service" can be simply described, in general, as station-to-station local telephone service. To wit, "telephone exchange services" is defined by the Act as

> (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission

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31 47 U.S.C. §251(c)(2)(A).

32 *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, CC Docket No. 96-98, ¶184 (rel. August 8, 1996) ("*Local Competition Order*"). The Commission found in the *Local Competition Order* that "the phrase 'telephone exchange service and exchange access' imposes at least three obligations on incumbent LECs: an [I]LEC must provide interconnection for purposes of transmitting and routing telephone exchange traffic or exchange access traffic or both." *Id.* The Commission explained in that order: "that Congress did not want to deter entry by entities that seek to offer either service, or both." The Commission therefore concluded "that requiring new entrants to make available both local exchange service and exchange access as a prerequisite to obtaining interconnection to the [I]LEC's network under section 251(c)(2) would unduly restrict potential competitors." *Id.* at ¶185.

> equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service.[33]

In contrast with telephone exchange service, "exchange access" is "the offering of access to telephone exchange services or facilities for the purpose of origination or termination of telephone toll services,"[34] commonly referred to as long distance services. Consequently, as long as a CLEC's customers are originating and terminating local *or* long distance calling, or their customer's customers are, then the CLEC is entitled to interconnection pursuant to Section 251(c)(2).

The case where a CLEC's customer is a VoIP provider is illustrative. Despite the fact that the Commission has yet to declare whether VoIP is an information service or a telecommunications service, in either event, telecommunications carriers provide VoIP service providers with *either* telephone exchange access services *or* exchange access services, or both. To the extent that the Commission determines that VoIP carriers offer "telecommunications service" and are "telecommunications carriers" under the Act, the customers of VoIP providers would either be making local or long distance toll calls, or be sending local telephone exchange services traffic to the interconnecting CLEC. Where the VoIP provider's customer dials, or receives a call from, another local end user, the VoIP provider would be a LEC and the traffic the CLEC carries over the interconnection is telephone exchange service. Where the VoIP subscriber places or receives a long distance call, the VoIP provider would be an interexchange carrier looking to originate or terminate traffic through exchange access services through the

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33 47 U.S.C. §153(47).

34 47 U.S.C. §153(16). "Telephone Toll Service," in turn, is defined as "telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service."

CLEC. In such case, the interconnecting CLEC is transmitting or routing either telephone exchange traffic or exchange access traffic.

Conversely, to the extent that VoIP is classified as an "information service" as that term is defined by the Act, VoIP providers, as enhanced service providers,[35] would be deemed end-users.[36] As such, the VoIP providers would be eligible for the enhanced services exemption and may purchase local business lines from the CLECs as end-users.[37] In that case, the VoIP-originated traffic would be entitled to be treated as local telephone exchange traffic by the interconnecting CLEC serving the VoIP provider. Thus, in the scenario where the VoIP provider is an enhanced services provider the interconnecting CLEC would be routing telephone exchange service to and from the ILEC and meet the 251(c)(2) criteria.[38]

Finally, all of the traffic received from end user customers of an interconnecting ILEC, received and carried in TDM mode by the wholesale CLEC and delivered to the VoIP carrier for transmission to its end user customers, would be routine local exchange or exchange access service.

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35 *Non-Accounting Safeguards Order* at ¶¶102-04; *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, ¶789 (1997), *aff'd sub nom. Allenco Communications, Inc. v. F.C.C.*, 201 F.3d 608 5th Cir. 2000).

36 *Access Charge Reform*, 12 FCC Rcd 15982, 16131-16135 (1997), *aff'd Southwestern Bell Telephone Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998), *citing MTS and WATS Market Structure,* Memorandum Opinion and Order, 97 FCC 2d 682, 711-722 (1983) *aff'd, NARUC v. FCC,* 737 F.2d 1095, 1137 (D.C. Cir. 1984) and *Amendment of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, Order, 3 FCC Rcd 2631 (1988).

37 *See, MTS and WATS Market Structure* at ¶83 (exempting enhanced service providers from the payment of access charges in order to foster competition in the enhanced services market).

38 Further, the FCC has made clear that once a requesting carrier otherwise qualifies for interconnection under 251(c)(2), it may use the interconnection for other purposes. Specifically, where an interconnecting carrier is exchanging telephone exchange service or exchange access traffic over the interconnection with the ILEC, it could also use that interconnection arrangement for "information services" traffic. *See Local Competition Order* at ¶995. *See also*, 47 C.F.R. §51.100(b) ("a telecommunication carrier that has interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, so long as it is offering telecommunications services through the same arrangement as well").

Consequently, regardless of how VoIP is classified, the CLECs serving VoIP providers that desire to interconnect with CLECs are still providing "for the transmission and routing of telephone exchange service or exchange access."[39] Thus, under either regulatory classification that may ultimately attach to VoIP providers, CLECs are entitled to interconnection pursuant to Section 251(c)(2) in order to serve VoIP provider customers.

II. CONCLUSION

State commission interpretations limiting the rights of wholesale carriers to interconnect with ILECs are clearly in violation of Section 251 of the Telecommunications Act. Moreover, wrongly decided orders threaten to disrupt the development of telecommunications competition using important new technology, which this Commission has relied upon to justify many of its recent rulings. The Commission should therefore step in to ensure that such decisions are not allowed to derail the policies that Congress has mandated and this Commission has striven to implement to foster the growth of competition and to promote the spread of new telecommunications technologies.

In light of the foregoing, the Joint Commenters request that the Commission grant, in its entirety, Time Warner's petition for declaratory ruling by reaffirming that Sections 251(c)(2) and 251(a) of the Act, as interpreted by applicable Commission and court precedent, entitle CLECs to interconnect with ILECs in order to transmit and route traffic of the customers it serves with telecommunications traffic, whether the customers are wholesale or retail.

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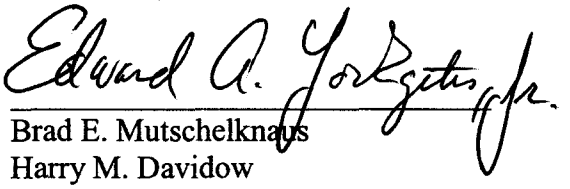
[39] 47 U.S.C. §251(c)(2)(A).

Respectfully submitted,



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Dated: April 10, 2006

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